BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

A.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the Circuit Court of Appeals is reported in 134 F. (2d) 725 (Advance Sheets May 31, 1943). The opinion of the District Court is at present not reported.

The opinions of the Referee, the District Court, and the Circuit Court of Appeals appear in the record as follows:

Certificate of Referee upon petition of Maryland Casualty Company for review filed in the District Court June 9, 1941 (R. pp. 34 to 62 inc.).

Opinion of the District Court filed March 30, 1942 (R. 62).

Opinion of the Circuit Court of Appeals rendered and filed April 8, 1943 (R. 76).

B.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229 (43 Stat. 938; 28 U. S. C. A. 347). The decree of the Circuit Court of Appeals for the Sixth Circuit was entered on April 8, 1943 (R. 75). No petition for rehearing was filed. The petition for certiorari was filed herein before the expiration of three months from April 8, 1943.

C.

STATEMENT OF CASE.

A full statement of the case has been given in the petition for certiorari herein (*supra*, pp. 4 to 6) and for the sake of brevity will not be repeated.

D.

SPECIFICATION OF ERRORS.

The errors intended to be urged are those specified under the caption "B" in the petition for certiorari, and in the interest of brevity will not be repeated.

E.

ARGUMENT.

I. MARYLAND PERMITTED BANKRUPT TO EXERCISE DOMINION OVER THE FUND ASSIGNED UNTIL THE DATE OF BANKRUPTCY.

The Referee found (R. 48; Finding 26, R. 27) that it was the intention of the parties that Bankrupt, until default, should have the right to collect all moneys from time to time becoming due and payable upon the Summit County contracts and to use the funds collected by it for its own purposes without any duty on the part of Bankrupt to account to Maryland therefor, and that this dominion retained by Bankrupt rendered the assignment void as against the Trustee. The District Judge (R. 65), and the Circuit Court of Appeals (R. 80) found that the assignment applied only to the funds due at the time of default or that might thereafter become due, and therefore no dominion was exercised by Bankrupt, and therefore the assignment was valid.

We submit that the finding of the Referee was correct as a matter of law, and the finding of the courts below erroneous, because of the language of the indemnity agreement. The pertinent portion of the Indemnity Agreement provides (R. 9, 10) in the event of default by Bankrupt in connection with (i) the immediate contract; (ii) any former contract bonded by Maryland; or (iii) any subsequent contract bonded by Maryland:

> "* * * **all** payments due or to become due under the contract covered by the bond(s) herein applied for, shall

be paid to the Company—and this covenant shall operate as an assignment thereof * * *."

What did Bankrupt assign by this covenant? The covenant plainly says "all payments due or to become due"; it does not say all payments due at the time of default or thereafter becoming due. It is difficult to conceive of a mortgage or assignment of tangible or intangible property as security for a debt that has no force or effect, even between the parties, so long as the mortgagor or assignor is not in default, but immediately and automatically becomes effective upon default. Under such an anomalous arrangement there is no effective disposition of title; nothing certain is assigned; whether there is a lien or not is all left in the control of the mortgagor or assignor. If the assignor is a day late in paying a material bill does the assignment become effective? Does it cease to be effective when the delayed payment is made? It would seem clear that the parties intended that the entire contract price be assigned from the moment that the indemnity agreement was signed by the Bankrupt, that Maryland should at once have an interest therein, but that until a default occurred in the performance of the immediate contract, or in some past or future contract bonded by Maryland, Bankrupt could collect payments from time to time becoming due, even to the complete exhaustion of the entire contract price, and could use the amounts collected without accountability therefor. The Trustee contends that such an arrangement is void as to him, in the right of an execution creditor.

We submit that the construction adopted by the Courts below is fallacious, but if it is the proper construction, then the assignments are void for uncertainty and for the reason that, in the language of Mr. Justice Brandeis in the *Ratner* case (*post*, p. 16), nothing certain or definite was assigned; there was no "effective disposition of title." Under the Court's construction it would be impossible for

anyone to determine what was assigned until a default occurred. It might be all of the contract price, or any fractional part thereof, or none of it. How could Bankrupt, or anyone dealing with Bankrupt, at any time know what was assigned? It is familiar law that a chattel mortgage upon that part of a stock of merchandise which remains unsold, or a mortgage of consumable goods that the mortgagor has not consumed, or an assignment as collateral of such accounts receivable as the assignor has not collected at the time of default, is null and void for uncertainty. Any such arrangement does not comply with the primary legal or equitable requirements for setting apart tangible or intangible property as security for the payment of a debt or the performance of any other obligation.

II. THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN DIRECT CONFLICT WITH THE DECISION OF THIS COURT IN THE CASE OF BENEDICT V. RATNER (1925) 268 U. S. 353.

In the case of *Benedict v. Ratner*, a carpet company more than four months prior to bankruptcy assigned *all* of its accounts receivable, *both present and future*, to Ratner to secure an existing loan and future advances. The assigned accounts were to be collected by the company, which retained the right to use the moneys collected for its own purposes without accountability, but Ratner was given the right *at any time* to require that the amounts collected be applied in payment of his loans and to enforce the assignment although no loan had matured. Eight days before bankruptcy Ratner directed the company to pay to him the sums thereafter collected, which was done. Upon bankruptcy the accounts were collected first by the receiver and then by the trustee. Ratner filed a bill in equity against the trustee to recover the amounts collected, claiming them by virtue of the assignment to him. The trustee filed a cross-bill to recover the amounts paid to Ratner by the company.

This Court solved the questions presented by reference to the law of New York. The New York Court of Appeals had not passed upon the question of the validity of the assignment of accounts receivable as security where the assignor reserved the right to collect and use the amounts collected, but on numerous occasions had held a chattel mortgage void where the mortgagor retained the power of sale and the right to use the proceeds of sale without accountability to the mortgagee therefor. The law of New York in this respect is identical with the law of Ohio. Mr. Justice Brandeis summarizes the law of New York with respect to chattel mortgages as follows (268 U. S. 360):

> "Under the law of New York a transfer of property as security which reserves to the transferer the right to dispose of the same, or to apply the proceeds thereof, for his own use, is, as to creditors, fraudulent in law and void. This is true whether the right of disposition for the transferer's use be reversed by the instrument or by agreement *in pais*, oral or written; whether the right of disposition reserved be unlimited in time or be expressly terminable by the happening of an event; whether the transfer cover all the property of the debtor or only a part; whether the right of disposition extends to all property transferred or only to a part thereof; and whether the instrument of transfer be recorded or not."

Numerous New York cases establishing this rule with reference to tangible personal property are cited in footnotes to the opinion. It is unnecessary to review the New York cases here. The question before this Court was whether the rule applied by the New York courts with reference to tangible personal property also applied to the assignment as security of book accounts. If so, the arrangement with Ratner was void. Mr. Justice Brandeis stated (268 U. S. 361):

> "But it would seem clear that whether the collateral consist of chattels or of accounts, *reservation of*

dominion inconsistent with the effective disposition of title must render the transaction void." (Emphasis supplied.)

He again stated (268 U. S. 364):

"*The results which flow from reserving dominion inconsistent with the effective disposition of title must be the same whatever the nature of the property transferred.* The doctrine which imputes fraud where full dominion is reserved must apply to assignments of accounts * * *.

"In the case at bar, *the arrangement for the unfettered use by the company of the proceeds of the accounts precluded the effective creation of a lien, and rendered the original assignment fraudulent in law.* * * *." (Emphasis supplied.)

The test applied by Mr. Justice Brandeis was whether the dominion reserved by the mortgagor or assignor was consistent with the effective disposition of title. If the mortgagor reserved the right to sell the mortgaged chattels and to use the proceeds, or to collect assigned accounts receivable and to use the proceeds, there was no effective disposition of title and the transaction from its very nature was null and void. There was no assignment at all, because there was no change of dominion and no passage of title. The rule as stated by Mr. Justice Brandeis is of general application without respect to the nature of the property involved, whether chattels or accounts receivable. Progress estimates, as well as retained percentages, under road paving contracts are, of course, in the category of accounts receivable.

The Referee (R. 50) calls attention to the application of the rule of the *Ratner* case by the Circuit Court of Appeals for the Second Circuit in the case of *Blue v. Herkimer National Bank* (1929) 30 F. (2d) 256, where an assignment to a bank for security of moneys to become due to a road contractor was held void because the free and unrestricted use by the assignor of the moneys as-

signed destroyed any lien created. The Referee also cites (R. 50) the case of *Lee v. State Bank* (1930) 38 F. (2d) 45, which held that there is no distinction between a mortgage or pledge of chattels and an assignment of book accounts in respect to the reservation of unrestricted power of disposition for mortgagor's or assignor's own purposes. In both cases the transaction was held to be conclusively fraudulent and void.

While the question in the *Ratner* case was solved by reference to the law of New York before the decision in *Erie R. R. v. Tompkins* (1938), 304 U. S. 64, it has a much broader application because it in effect holds that the principle expounded applies wherever the New York rule is followed and renders void both a mortgage of chattels and an assignment of intangibles, when unrestricted dominion is reserved to the mortgagor or assignor.

The District Judge in the case at bar sought to distinguish the *Ratner* case on the ground (R. 65):

> "that the question of domination over the funds by the Bankrupt arises only as to the situation following default * * *.
>
> "The fact seems to be that no domination was exercised over the Summit County funds following default * * *."

The Circuit Court of Appeals (R. 80, 81) approved this distinction.

We submit the District Judge's statement is in direct conflict with the statement of Mr. Justice Brandeis, who pointed out that the rule applies

> "whether the right of disposition reserved be unlimited in time or *be expressly terminable by the happening of an event* * * * whether the right of disposition extends to all property transferred or only to a part thereof." (Emphasis supplied.)

Citing *Zartman v. First National Bank* (1907), 189 N. Y. 267, 82 N. E. 127, and other cases.

In the *Zartman* case a mortgagor gave a mortgage of real estate and chattels to secure negotiable bonds. The mortgagor retained the right to sell the mortgaged chattels for his own use and benefit *until default.* This, of course, is but another way of stating that the chattel mortgage applied only to those chattels remaining at the time of default. The New York Court of Appeals held the mortgage void as against the mortgagor's trustee in bankruptcy because, among other reasons (189 N. Y. 273),

> "an agreement permitting the mortgagor to sell for his own benefit renders the mortgage fraudulent as a matter of law as to the creditors represented by the plaintiff [trustee in bankruptcy]."

III. THE DECISION OF THE CIRCUIT COURT OF APPEALS CONFLICTS WITH THE APPLICABLE DECISIONS OF THE COURTS OF LAST RESORT OF THE STATE OF OHIO.

If, by reason of the decision of this Court in *Erie R. R. Co. v. Tompkins* (1938), 304 U. S. 64, 82 L. ed. 1188, the rule of the *Ratner* case is no longer of general application but is merely a construction of the law of New York, nevertheless the reasoning in the *Ratner* case is clearly applicable under the law of Ohio. This Court in the *Ratner* case reasoned as follows: Under the New York cases a transfer of tangible personal property as security for a debt is conclusively fraudulent and void as to the creditors of the transferor if he reserves the right to sell and use the proceeds of sale without accountability because the assignment was inconsistent with the effective disposition of title; while the New York Court of Appeals has not passed upon the validity of a like assignment of accounts receivable, the same rule applies whether the property transferred, but with dominion reserved, is tangible or intangible; therefore, the assignment of accounts receivable to Ratner was fraudulent and void. The same result is necessarily reached under the applicable decisions of Ohio.

(a) The Ohio Decisions Concerning Mortgages of Chattels with Power of Sale Reserved Without Accountability.

The Supreme Court of Ohio has repeatedly held that a mortgage of a stock of merchandise, where the mortgagor retains the right to sell and use the proceeds, is void as against creditors. The law of Ohio in this respect is the same as the law of New York as expounded in the *Ratner* case.

In *Collins v. Myers* (1847), 16 Ohio 555, a chattel mortgage of a stock of merchandise to secure a debt provided that the mortgagor should remain in possession with full power of sale and the right to use the proceeds *until default.*[8]

After default had occurred, judgment creditors levied upon the mortgaged property. The merchandise was thereafter sold by consent and the mortgagee filed an action against the execution creditors to compel the application of the proceeds of sale to the mortgage debt. The court held the mortgage void as to all the world except as to the parties themselves.

Judge Read, speaking for the Court, said (16 Ohio 554):

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[8] In this respect the chattel mortgage in the *Collins* case is closely analogous to the assignment of Bankrupt to Maryland. In the *Collins* case (as well as in the *Zartman* case from New York, *supra*), *the mortgagor's right of disposition was to cease upon default.* In other words, the mortgagor's dominion was subject to termination upon the happening of a *condition subsequent*, i.e. default. In the case at bar, the courts below held that Maryland's rights were subject to a *condition precedent*, i.e. default, and therefore Bankrupt had no dominion over the funds assigned. It is difficult in this respect to distinguish between a condition subsequent and a condition precedent. The net result is the same. Bankrupt admittedly had the right to dominion over the fund assigned until default, and both the Ohio Supreme Court and the New York Court of Appeals held such an arrangement void as to a trustee in bankruptcy of a chattel mortgagor. The courts below thus ignored the law of Ohio as announced in the *Collins* case.

"The very nature of a mortgage is to fasten a lien upon *specific property*; * * *. But in this case there is no specific lien, but a floating mortgage, which attaches, swells and contracts, as the stock in trade changes, increases and diminishes, or may wholly expire by entire sale and disposition, at the will of the mortgagor. Such a mortgage is no certain security upon specific property; it all depends upon the honesty and good faith of the debtor; and as he might dispose of it to a creditor at will, to satisfy a debt, *we see no reason why a creditor might not seize it against his will, for the same object.*" (Emphasis supplied.)

Judge Read again says (16 Ohio 555):

"* * * But at all events we have not the slightest hesitation in saying that a mortgage which secures possession and the full power of disposition in the mortgagor *until condition broken*, will not hinder creditors from seizing property thus mortgaged on execution, and applying the proceeds to the payment of debts. Nor will it prevent the mortgagee from assigning to pay debts, for he has the power of disposition by the instrument itself. *As to all the world except as to the parties themselves, such a mortgage will be held void, as against the policy of the law.*" (Emphasis supplied.)

The Court thus held the mortgage invalid and the levying judgment creditors prevailed. The trustee in the case at bar is a levying creditor under Section 70c of the Bankruptcy Act.

The *Collins* case is strikingly similar to *Zartman v. First National Bank* (*supra*, p. 17), cited by this Court in the *Ratner* case, where the Court of Appeals of New York held a similar chattel mortgage void as against a trustee in bankruptcy.

The *Collins* case was followed some years later in *Freeman v. Rawson* (1855), 5 O. S. 1. The *Freeman* case involved a chattel mortgage on a stock of merchandise where the mortgagor retained possession with power to

sell and dispose of the merchandise and use the proceeds for his own benefit without accountability to the mortgagee. The Court in an able opinion by Judge Ranney held the mortgage void because of the dominion retained by the mortgagor. The Court says (p. 8):

> "* * * The mortgage must be precisely what it purports and professes to be, and must operate an absolute surrender of the property for the security of the mortgagee. The creditor has the right to secure himself, but he has no right to hold his lien upon the property, and stipulate for advantages to the mortgagor, to the prejudice of other creditors. * * *."

The Court (5 O. S. 8) discusses the *Collins* case and states:

> "It is there held, that **a mortgage of personal property, is void as against subsequent purchasers and execution creditors.**" (Emphasis supplied.)

The same rule necessarily applies to an assignment of receivables where dominion is retained by the assignor. Therefore, the assignment by Bankrupt to Maryland of the Summit County funds is void as against the Trustee in his capacity as an execution creditor under Section 70c of the Bankruptcy Act under both the *Collins* and *Freeman* cases.

The Court held the mortgage in the *Freeman* case null and void, and that this was true whether or not the entire stock of goods was sold. Judge Ranney (5 O. S. 8) expressly followed and approved the reasoning of the *Collins* case that "such a mortgage is no certain security upon specific property" and that such a mortgage is really no mortgage at all. Judge Ranney's conclusions are stated as follows (5 O. S. 12):

> "From the considerations and authorities we have adduced, we are of the opinion that these conclusions necessarily follow: That a *mortgage of personal property, with possession, and a power of disposition reserved to the mortgagor, is fraudulent and void as against his other creditors.* If the power of disposition

appear upon the face of the mortgage, or is fairly to be inferred from its provisions, it is the duty of the court so to declare it, without submitting the matter to the jury as a question of fact. If it does not so appear, but is so understood or agreed by the parties at the time the mortgage is executed, it is equally void; and such understanding or agreement may be shown by parol evidence, and may be proved by the conduct of the parties in relation to the subject-matter of the mortgage and other circumstances, as in other cases. And that in either case, where the fact is made to appear, the mortgage is fraudulent in law, irrespective of the intention of the parties.

"Our attention has been called to the act of February 24, 1846, requiring such mortgages to be deposited with the township clerk. It is only necessary now to say, that whatever may be the effect of that act in rebutting the presumption of fraud arising from leaving the property in the possession of the mortgagor (upon which a variety of opinions will be found to exist), it has no effect to validate those in which such power of disposition is retained." (Emphasis supplied.)

In the case of *Harman v. Abbey* (1851), 7 O. S. 218, the same rule was applied. The Court says (7 O. S. 219):

"It was adjudged by the last Supreme Court of this state, in the case of *Collins v. Myers*, 16 Ohio 547, that *a mortgage of personal property, where the mortgagor retains possession of the property mortgaged, with the power of sale, is void as against subsequent purchasers and execution creditors.* The doctrine of that case was fully affirmed by this court in the case of *Freeman v. Rawson*, 5 O. S. 1. These cases are decisive of the case before us. * * *." (Emphasis supplied.)

The same rule was again followed in the case of *Enck v. Gerding* (1902), 67 O. S. 245. The Court says (67 O. S. 249):

"That the mortgage is void as to creditors, because of the power in the mortgagors to sell the chattels described, is established by numerous cases."

Citing the *Collins, Freeman* and *Harman* cases.

These cases concerning chattel mortgages have never been overruled and are the law of Ohio today.[9]

The test applied by the Supreme Court of Ohio is whether the power of disposition and the right to use the proceeds was retained by the mortgagor. In all four cases the court held the mortgage void because the power of disposition and right to use the proceeds was reserved to the mortgagor, and in three cases the court says the mortgage *is void as against execution creditors.* The trustee in the case at bar under Section 70c of the Bankruptcy Act has the rights of an execution creditor.

It could well have been argued in all four cases (as Maryland has argued in this case and as the courts below have held) that the mortgage applied only to such chattels as remained unsold at the time of default, and that the mortgagor had no power to sell after default. In fact in the *Collins* case the mortgagor's power of sale expressly was to cease upon default. The Supreme Court of Ohio nevertheless held such transactions void *ab initio*, and that if the power of disposition was made to appear either in the mortgage or otherwise the mortgage was fraudulent in law irrespective of the intention of the parties.

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[9] In the case of *Francisco v. Ryan* (1896), 54 O. S. 307, it was held that a mortgage which permitted a mortgagor to retain possession with the power of sale is ineffectual to create a lien as against creditors of the mortgagor who assert the rights against the property while it remains under his control, but is valid as to the creditors after the mortgagee takes possession. For an excellent editorial note on the rights under the law of Ohio of a chattel mortgagee who has allowed the mortgagor to retain possession of the mortgaged chattels with a power of sale, see 7 *Cincinnati Law Review* (1933) 315.

The *Ratner* case applies the rule of law, announced by the Ohio Supreme Court with respect to chattels, to another form of personal property, namely, accounts receivable, and holds that an assignment of accounts receivable where the assignor reserves the right to collect the accounts and to apply the collections to its own purposes is conclusively fraudulent and void.

(b) The Ohio Decisions Concerning the Mortgaging of Rents and Profits of Real Estate.

The nearest approach in Ohio to a decision on the matter of the assignment for security of choses in action with power reserved to the assignor to collect and use the assigned receivables is to be found in three cases decided by three different courts of appeals[10] with respect to the pledging of rents and profits in connection with a mortgage of real estate. They are not exactly in point, but are close parallels, and illustrate the rule for which we are contending.

In *Norwood Savings Bank v. Romer* (Court of Appeals of Hamilton County, 1932), 43 O. App. 224, 183 N. E. 45, a mortgage of real estate, duly recorded, expressly included a pledge of rents and profits. The mortgagor, or someone on his behalf until foreclosure and the appointment of a receiver, collected the rents and applied them upon other debts of the mortgagor. The mortgagee brought suit for foreclosure and a receiver was appointed to collect the rents thereafter accruing. After the foreclosure sale a deficiency judgment remained and the mortgagee sought to recover the amount of rents collected prior to the appointment of a receiver. The Court of Appeals held that, notwithstanding the express pledge of the rents, the mort-

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[10] There are nine courts of appeals in Ohio whose decisions are final in most cases unless a motion to certify is allowed by the Supreme Court of Ohio. See Ohio Constitution, Article IV, Sections 2 and 6.

gagee had no right to them until they were reduced to possession by the appointment of the receiver.

In *Connecticut Mutual Life Insurance Co. v. Shelly Seed Corporation* (Court of Appeals Henry County, 1933), 46 O. App. 548, 189 N. E. 655, a mortgage to the insurance company on farm property, duly recorded, expressly provided that *in the event of default the rents of the mortgaged real estate should accrue to the benefit of the mortgagee and the occupants of the premises should then pay rent only to the mortgagee.* In this respect the mortgage closely resembles the claim of Maryland in the case at bar that the assignment was subject to a condition precedent and was to become effective upon default. The farm was rented upon a share crop basis. After default the mortgagee sought to recover the landlord's share of the crop, but the court held the mortgage or pledge of the rents invalid for the reason, among others, that other rights had attached *after default* but prior to the time the insurance company brought proceedings to reduce to possession its share of the crop rent.

The same rule was applied in the case of *Metropolitan Life Insurance Co. v. Begin* (Court of Appeals Lucas County, 1938), 59 O. App. 5, 16 N. E. (2d) 1015.

These rent cases, of course, do not decide the precise point of the case at bar, but they do establish a corollary that the Courts of Appeals of Ohio will not give effect to a mortgage of rents, although duly recorded, where the mortgagor is permitted to collect the rents, unless and until the mortgagee reduces the rents to possession by the appointment of a receiver or by entry into possession of the mortgaged property, and the rule applies even where the mortgage in express terms includes rents and specifically directs that the rents be paid to the mortgagee after default. They clearly indicate that in Ohio the same rule applies both to tangibles and intangibles where dominion is reserved to the mortgagor or assignor.

IV. THE OHIO CASES RELIED UPON AND CITED BY THE COURT OF APPEALS ARE NOT IN POINT AND DO NOT SETTLE THE LAW OF OHIO UPON THE ISSUE NOW BEFORE THE COURT.

The Circuit Court of Appeals cited and discussed three Ohio cases as establishing the law of Ohio that a present assignment of a fund, which may accrue and be ascertained in the future upon the happening of a specified event, is valid and entitled to priority over subsequently attaching creditors of the assignor who become creditors without notice of the assignment (R. 79, 80). These cases are *Copeland v. Manton* (1872), 22 O. S. 398; *Warren Guarantee Title & Mortgage Co. v. Williams* (1928), 27 O. App. 505, 161 N. E. 551; and *Kittinger, Witt & Co. v. Brookins* (1929), 35 O. App. 266, 172 N. E. 297.

We submit that these cases are not in point and do not solve the question at issue. The Circuit Court of Appeals overlooks an important distinction. In none of these cases did the assignor reserve to himself the right to collect and use without accountability any part of the moneys coming due and payable upon the chose in action assigned. The assignor had done everything legally or equitably necessary to confer a complete and present right upon the assignee.

In *Copeland v. Manton* a building contractor assigned to a subcontractor the balance owing to him from the owner *in payment of a debt* owing by the builder to the subcontractor. Another subcontractor subsequently attempted to obtain a lien upon the same fund by virtue of a proceeding under the mechanics' lien law then in effect. The contractor (assignor) made no effort to collect any part of the fund assigned and retained no right to do so. The court held the assignment valid although no notice had been given to the owner.

In the *Warren Guarantee Title & Mortgage* case, the defendant Williams was a co-defendant in another action

in which he asserted certain claims against the plaintiff in a cross-petition. Williams assigned these claims (asserted in the cross-petition) to a bank to secure Williams' promissory note. No notice of this assignment was given to the obligor. The cause was tried in Williams' (the assignor's) name and was reduced to judgment against the plaintiff (the obligor). The title company filed a second suit against Williams and had garnishee process served upon a receiver holding funds with which to pay the judgment. The Court of Appeals held the assignment to the bank valid, although no notice of the assignment had been given either to the plaintiff in the other action or to the receiver. This title company case is clearly distinguishable from the case at bar since no power was reserved by the assignor to collect the judgment and to use the proceeds without accountability to the assignee therefor.

In *Kittinger, Witt & Co. v. Brookins,* a claim for personal injuries, subsequently reduced to judgment, was assigned to secure a debt. The court held the assignment valid as against an attaching creditor of the assignor, although no notice of the assignment had been given. This case also is distinguishable because no right to collect and use the judgment was retained by the assignor.

We submit, while these cases hold that in Ohio a chose in action may be assigned without notice to the debtor, and that such a "no-notice" assignment is valid as against an attaching creditor, they do not hold that an assignment is valid where the assignor has the power to collect and use all or any part of the fund assigned without accountability. This distinction renders the cases cited immaterial for the purposes of this litigation. They do not state the law of Ohio with reference to the matter before the Court.

CONCLUSION.

We respectfully submit that the Circuit Court of Appeals, and the District Court as well, erred as a matter of law in holding that Bankrupt retained no dominion over the fund assigned. From the plain language of the Indemnity Agreement the fund assigned was "*all payments due or to become due*" and not merely that part of the contract price due or to become due after default. The interpretation of the indemnity contract made by the Circuit Court of Appeals and the District Court is contrary not only to the rule of *Benedict v. Ratner,* but also to the applicable decisions of Ohio. In so holding, the Circuit Court of Appeals for the Sixth Circuit has decided an important question of local law in conflict with applicable local decisions, and has decided an important question of general law in conflict with the decision of this Court in *Benedict v. Ratner.*

It is therefore submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the errors complained of may be corrected, and that for such purpose a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals and reverse it.

Respectfully submitted,

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